IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

TUESDAY, THE 13TH MARCH 2007 / 22ND PHALGUNA 1928

WP(C).No. 28945 of 2006(U)

PETITIONERS:

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1. TUFAIL AHAMED, S/O.LATE A.S.AHAMED SAHIB
AGED 22 YEARS, RESIDING AT ASHA MANZIL,
T.B. ROAD, PALAKKAD.

2. TASIF AHAMED, S/O.LATE A.S.AHAMED SAHIB,
AGED 18 YEARS, RESIDING AT ASHA MANZIL
T.B. ROAD, PALAKKAD.

3. AYISHA MALIKA,
D/O.LATE A.S.AHAMED SAHIB, AGED 21 YEARS,
RESIDING AT ASHA MANZIL
T.B. ROAD, PALAKKAD.

4. MRS.SAFIYA AHAMED SAHIB,
W/O.LATE A.S. AHAMED SAHIB,
AGED 50 YEARS, RESIDING AT ASHA MANZIL,
T.B. ROAD, PALAKKAD.

5. A.S. SUBIKHA, W/O.LATE V.A.AHAMED SAHIB
AGED 72 YEARS, RESIDING AT CHEMBAKASSERRY,
ALUVA, ERNAKULAM-REPRESENTED BY POWER OF
ATTORNEY HOLDER & SON BADEERU SAMAL, AGED 50 YEARS
RESIDING AT CHEMBAKASSERRY, ALUVA.

6. A.S. BADURUNEESA,
W/O.M.S. UMMERSAHIB, AGED 66 YEARS,
RESIDING AT 9/46, SENGUSOTHA STREET,
COIMBATORE.

7. A.S. RASHEEDA, W/O.S.A.MOHAMED HUSSAIN
AGED 63 YEARS, RESIDING AT MANJAKULAM ROAD,
PALAKKAD.

BY ADV. SRI.P.N.KRISHNANKUTTY ACHAN(SR.)
SRI.M.A.ZOHARA

WP(C) NO: 28945/2006

RESPONDENTS:
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1. STATE OF KERALA, REPRESENTED BY THE SECRETARY TO GOVERNMENT, LOCAL SELF GOVERNMENT DEPARTMENT, SECRETARIAT, THIRUVANANTHAPURAM.

2. THE PALAKKAD MUNICIPALITY REPRESENTED BY ITS SECRETARY, PALAKKAD MUNICIPALITY, MUNICIPAL BUILDINGS, PALAKKAD.

BY ADV. SRI.V.CHITAMBARESH --- R2
SRI.T.C.SURESH MENON
GOVERNMENT PLEADER SRI. K.J. MUHAMMED ANSAR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 13/03/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WP(C) NO: 28945/2006 U

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1. COPY OF THE GO (RT) NO. 1508/2004 LSGD DT. 17/5/04.

EXT.P2. COPY OF THE ORDER NO. C2/6844/04/ DT. 14/07/2004 ISSUED BY THE CHIEF TOWN PLANNER.

EXT.P3. COPY OF THE DEVELOPMENT CERTIFICATE ISSUED BY THE R2 MUNICIPALITY.

EXT.P4. COPY OF THE REPRESENTATION DT. 30/07/2005 BEFORE THE R2 MUNICIPALITY.

EXT.P5. COPY OF THE REPRESENTATION DT. 4/10/2005 SUBMITTED BEFORE THE R2 MUNICIPALITY.

EXT.P6. COPY OF THE DEVELOPMENT CERTIFICATE ISSUED BY THE R2 MUNICIPALITY.

EXT.P7. COPY OF THE RESOLUTION NO. 408 OF THE RESPONDENT COUNCIL DT. 6/11/2004.

EXT.P8. COPY OF THE DIRECTIONS ISSUED BY THE R2 SECRETARY TO ISSUE DEVELOPMENT PERMIT TO AJEEM DT. 6/10/2005.

EXT.P9. COPY OF THE LETTER OF ENQUIRY BY LOCAL ADMINISTRATION DEPARTMENT SECRETARY TO THE R2 PALAKKAD MUNICIPAL SECRETARY DT. 5/1/2006.

EXT.P10. COPY OF THE REPLY LETTER BY R2 DT. 23/1/2006 TO THE ABOVE ENQUIRY DT. 23/1/2006.

EXT.P11. COPY OF THE REPORT CHANDRIKA NEWS PAPER DAILY DT. 12/12/2007 ABOUT THE COUNCIL MEETING ON 11/1/2007.

EXT.P12. COPY OF THE AGENDA OF THE COUNCIL MEETING DT. 11/1/2007.

EXT.P13. COPY OF THE AGENDA OF THE COUNCIL MEETING DT. 27/09/2006.

EXT.P14. COPY OF THE LETTER ISSUED BY THE 2ND RESPONDENT.

EXT.P14A. COPY OF THE SKETCH OF THE PLOT ISSUED BY THE R2.

EXT.P15. COPY OF THE LETTER OF THE ENQUIRY BY THE chief TOWN PLANNER TO R2 DT. 21/5/2004.

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RESPONDENT'S EXHIBITS

EXT.R2A. COPY OF THE NOTICE ISSUED BY THE PALAKKAD MUNICIPALITY DT. 12/1/2007.

True copy

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PIUS C. KURIAKOSE, J.

W.P.(C) No. 28945 OF 2006

Dated this the 13th day of March, 2007

JUDGMENT

The legal representatives of Sri.A.S. Ahamed Sahib and the three sisters of Sri.Ahemed Sahib who have been in ownership and enjoyment of a fairly extensive area of land in Survey Nos.837, 840 & 841 of Block No.15 in Ward No.4 of Palakkad Taluk and Village are petitioners. They submit that on the basis of applications submitted by Sri.Ahamed Sahib, the Government on 17.5.04 granted permission for a commercial lay out, free of zonal restrictions upon the aforementioned lands. The Chief Town Planner also issued sanction as was directed in the Government Order. Ext.P1 is copy of the Government Order dt.17.05.04 and Ext.P2 is copy of the Chief Town Planner's sanction. Sri.Ahamed Sahib and his sisters were issued with a development certificate on 18.01.05, upon payment of requisite land conversion fee and development permit fee. The development permit was issued subject to five conditions. The petitioners submit that condition Nos.1,2,4 and 5 were quite acceptable and have been complied with. But they are aggrieved by the third condition which is to the effect that about 94 cents of land is to be reserved for transportation purposes to be preserved by the petitioners so that directions to be issued by the

Municipality from time to time in respect of that area can be complied with. The petitioners submit that 50 cents of land belonging to them were surrendered by them free of cost to the Municipality for construction of the intended Melamuri - T.B. Road - Town Bus Stand - Bye-Pass road and that the said road was constructed for the 2nd respondent-Palakkad Municipality as envisaged except for tarring. Even drainage facilities have been provided. Requisite surrender deed also was executed in favour of the 2nd respondent in respect of those 50 cents. Therefore it is not at all just on the part of the Municipality to insist that a further extent of 94 cents should be reserved for transportation purposes. According to the petitioners', the land upon which the Municipality intended and had been demarcated by the Municipality for its transportation project was a total extent of 2.5 acres of land in the same survey number belonging to one Mr.Azeem and not any portion of property belonging to the petitioners. They submit that they were made to believe by the Municipality that once it is seen that their property, though in the same survey number does not form part of the 2.5 acres actually reserved for transportation, condition No.3 will be lifted. It was certain that no portion of the petitioners' property is included in the transportation project land. Sri.Ahamed Sahib on 30.7.05 submitted Ext.P4 representation. It was not of any avail. Later

on coming to know that development permit without restriction was being issued in favour of the adjacent owner-Azeem, Sri. Ahamed Sahib submitted a further representation Ext.P5 on 04.10.05. The 2nd respondent proceeded to issue permit on 7.10.05 to the adjacent owner whose land is actually ear-marked for transportation project. The experience was heart-breaking for Sri.Ahamed Sahib who became disgusted and bed-ridden. Finally Sri.Ahamed Sahib passed away on 30.11.05 . Pursuant to the demise of Sri.Ahamed Sahib there was no one to pursue the matter. Neither the petitioners 1 to 4-his legal heirs nor petitioners 5 to 7 his aged sisters, were capable in view of their age and situation warranted by customs of the community. Ext.P6 development certificate is issued on 19.4.06 incorporating the conditions in Ext.P3 dt.18.1.05.

2. Petitioners reiterate that in the meanwhile they have handed over the land for road construction(Melmuri - T.B. Road, Town bus stand, Bye-pass) to the 2nd respondent and that a 15 meter wide road was constructed with drainage facilities completed in all respect but for tarring.

3. They painfully submit that even then the property which is kept under reservation is not released to them. They state that the land which is kept under reservation is not necessary for the 2nd respondent-

Municipality since the Municipality is having more suitable land for the same purpose and transporation, i.e., establishment of lorry parking area at Kalmandapam in an area abutting the National Highway and that considering that reason development permit has been issued to the owner of the adjacent land. The situation of the petitioners is very hard since the entire rest of their properties have been sold off for discharging their liabilities and the property kept under reservation is the only property which remains to them. The property is very valuable and it is on extraneous considerations that the 2nd respondent is withholding that property. This is gross injustice since 50 cents of land worth around Rs.Two crores have been surrendered free to the Municipality in terms of the conditions in Ext.P3 except the third condition regarding reservation. The imposition of the said condition is unjust and ultravires Exts.P1 and P2 orders of the Government and the Chief Town Planner respectively.

4. On the above averments the petitioners raise various grounds and pray that a writ of certiorari be issued quashing clause 3 of Ext.P3 on the ground that the same is violative of Ext.P1 Government Order and Ext.P2 sanction for commercial lay out Ext.P2 issued by the Chief Town Planner, Trivandrum. The other prayers are issuance of a writ of mandamus commanding the 2nd respondent-Municipality to lift the

restrictions imposed as per clause 3 of Ext.P3 and issue development certificate to the petitioners for 94 cents of land kept under reservation as per Ext.P3.

5. The 2nd respondent-Municipality has filed a detailed counter affidavit. It is contended therein that having accepted Ext.P3 development permit without demur and having surged ahead with the developmental activities for the rest of the area, the petitioners are not entitled to turn around and challenge the conditions in Ext.P3 after they have been issued with Ext.P6 development certificate on completion of work. The maintainability of the Writ Petition is challenged on the ground that the development permit which is issued under Rule 27 of the Kerala Municipality Building Rules, 1999 is open to challenge in a statutory appeal under Rule 160(2)(ii) of the Rules to the Tribunal for Local Self Government Institutions. The grounds raised on the basis of Ext.P1 Government Order is refuted by pointing out that Ext.P1 order granting zonal exemption specifies that prior sanction has to be obtained from the Municipality before commencing construction of the building. The Municipal Council by resolution No.408 dated 6.11.2004 decided to set apart 1.20 acres out of the total extent of 8.50 acres of land for transportation purposes. The intention is for establishing a lorry stand so as to prevent the traffic congestion in the heart of the town. Ext.P5

representation was heard on 2.1.2007 and the petitioners were represented by their Advocate. The matter was again deliberated in the meeting of the Municipal Council on 27.9.2006 wherein majority of the Councilors were much in favour of lorry stand. The Development Standing Committee of the Municipality was hence directed to study and report about invoking the urgent clause for land acquisition. The Committee has reported that at least 1.20 acres of land is required for the lorry stand and the Council has in its meeting on 11.1.2007 resolved to study the same in detail and Ext.R2(a) is copy of the decision which is communicated to the writ petitioners. The belated challenge made by the petitioners on Ext.P3 development permit is with the intention of selling the land to real estate builders. The Municipality has acted strictly in accordance with the Detailed Town Planning Scheme and the provisions of the Rules.

6. A very detailed reply affidavit has been filed by the petitioners who have produced a large number of documents to substantiate their case that the Municipality is adopting double standards in the matter of the proposal to have a lorry stand established in the area of the property covered by Ext.P3.

7. Smt.M.A.Zohra, Advocate addressed me on behalf of the petitioners while Mr.V.Chitambaresh, Standing Counsel for the 2nd

respondent-Municipality addressed submissions on behalf of the Municipality. Making detailed submissions on the basis of the pleadings Smt.Zohra referred to Exts.P1, P2 and P3. She also referred to Exts.P4, P5, P6, P9, P10, P11 and P14. My attention was drawn by her to Rule 27 (ix) of the Kerala Municipality Building Rules. The learned counsel would cite various judgment including the judgment of the Supreme Court in **Collector(Distt. Magistrate), Allahabad v. Raja Ram** (AIR 1985 S.C. 1622) and the judgments of this court in **Jancy Chandy v. Jose Puthenkala** (2006(4) KLT 116) and **Padmini v. State of Kerala** (1999(3) KLT 465) in support of various propositions which were canvassed by her. She also placed before me a photostat copy of the approved lay out plan.

8. Mr.V.Chitambaresh would vehemently resist Smt.Zohra's submissions on the basis of the counter affidavit submitted by the Municipality. He referred to Rule 160(2)(ii) of the Kerala Municipality Building Rules and also to Section 17 of the Madras Town Planning Act. Counsel further submitted that a statutory remedy was available to the petitioners and without exhausting the same, they are not entitled to invoke the extraordinary jurisdiction of this court. Copy of the judgment of the Division Bench in W.A.No.1389 of 2006 was also placed before me by the learned Standing Counsel.

9. I have anxiously considered the rival submissions addressed at the bar in the light of the relevant statutory provisions and also the ratio emerging from the various decisions which were cited at the Bar. I am of the view that the petitioners are entitled for reliefs.

10. I am not impressed by the submission of Mr.Chidambaresh that the petitioners or their predecessor have accepted Ext.P3 permit in its entirety without demur. The case of the petitioners that their predecessor were given assurances while receiving copy of Ext.P7 resolution that in case the area reserved for transportation purposes does not come within the commercial lay out Clause 3 will be lifted is not improbable. No concrete steps have been taken so far in the matter of establishing the lorry parking ground. Ext.P10 explanation submitted by the municipal Secretary to the Government will show that the order of the Municipality in giving exemption to Sri.Azeem 's property is being justified by Municipal Secretary inter-alia on the reason that pursuant to the earlier resolution of the Municipality to acquire 1.8574 cents of land which was taken in respect of Azeem's property in Survey No.814/1A, the Municipality has not even applied for the Government's permission for carrying out the acquisition. The other reason stated for justifying the exemption granted to Sri.Azeem is the zonal exemption orders issued by the Government and the Town Planner's approval obtained

before lay out prepared on the basis of the Government's order. There are like orders in favour of the petitioners also. The original proposal was to utilize 1.8574 hectors of land for the project and now that Sri.Azeem 's property has been excluded, it will not be possible for the Municipality to implement the proposal regarding establishment of a lorry parking ground by utilizing the petitioner's property which has got an extent of just 94 cents. I am of the view that the petitioners are also entitled for the relief which has been given to Sri.Azeem and I do not find any good reason for denying that relief to the petitioners. Admittedly till date no notification under Section 4(1) of the Land Acquisition Act has been promulgated for acquisition of the petitioners' property under reserve for the establishment of the lorry parking ground or for other public purpose. There is no justification for freezing a citizen's property indefinitely. The principles laid down by the Division Bench of this Court in **Padmini V. State of Kerala** [1999 (3) KLT 465] and by the Supreme Court in **Raju Jethmalani & others V. State of Maharashtra & others**'s [(2005) 11 SCC 222] case cannot be loss sight of.

11. Sri.Chidambaresh, learned counsel for the Municipality would place before me a judgment of the Division Bench of this Court in WA No.1389 of 2006. I do not know how that judgment can be of assistance

to the Municipality in this case. That was a case where this Court turned down a challenge against a land acquisition proposal. In the present case I do not find any concrete proposal for acquisition of the property so far. The challenge against the maintainability of the writ petition on the ground of availability of alternate remedy will also not receive acceptance since technical pleas are not to crib and cabin the jurisdiction of this Court to grant relief in deserving cases on considerations of justice and also since existence of alternative remedy is not an absolute bar for invocation of discretionary jurisdiction under Article 226.

The result of the discussion is that Clause 3 of Ext.P3 will stand quashed with effect from 31.03.07. If however, the Municipality is able to have a notification under Section 4(1) of the Land Acquisition Act promulgated in respect of the reserved property for the acquisition of that property either for the establishment of the lorry parking ground or for any other public purpose before that date, the quashment of Clause 3 of Ext.P3 will not come operative.

PIUS C. KURIAKOSE, JUDGE

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